

TO: ALL FIRM CLIENTS
FROM: Adam J. Friedman, Esq.
DATE: January 10, 2014
RE: Consumer Financial Protection Bureau Changes

Newly enacted Consumer Financial Protection Bureau (CFPB) rules designed to protect defaulted homeowners will become effective today, January 10, 2014. This memorandum will highlight the changes most directly related to the mortgage foreclosure process. Please note that Pulvers, Pulvers & Thompson, LLP only handles mortgage foreclosure matters in New York and New Jersey and therefore this memorandum exclusively interprets the above-referenced changes with those state's foreclosure processes in mind. Please contact your state specific foreclosure attorney for any procedural inquiries outside of New York and New Jersey.

These regulations only apply to servicers, which are defined as people responsible for the servicing of a federally related mortgage loan (including a person who makes or holds such loans if such person also services the loan). These regulations **do not** include "small servicers" who are defined as lenders that service 5,000 or fewer mortgage loans and service only mortgage loans that they or an affiliate originated or own. This differentiation aims to reward the small servicers who typically have strong consumer service safeguards already built in their lending practices. A small servicer is required to comply with two requirements: (1) a small servicer may not send the Notice of Intent to Foreclose unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement. (See §1024.41 (j))

§ 1024.41 Loss Mitigation Procedures

The Loss Mitigation Procedures section is the most pertinent to the mortgage foreclosure process and is therefore discussed first, for your convenience. More specifically, this section places numerous stays on the foreclosure process, regardless of state, and creates an appellate process for homeowners who have been denied for loss mitigation options.

Restriction on Commencement

This section imposes restrictions on the commencement of a foreclosure action in an effort to decrease “dual-tracking”; the term used to explain a situation where the servicer continues to foreclose on a property while simultaneously accepting and reviewing for possible loan modification or non-retention options. Please note that a servicer is only required to comply with these requirements for a **single** complete loss mitigation application for a borrower’s mortgage loan account (See §1024.41 (i)). Therefore, once a loss mitigation application has been properly denied, the stays discussed in this section no longer need to be self-imposed.

120 Stay Upon Commencement – All Actions § 1024.41(f)(1)

From the outset, the rules impose a stay of 120 days from default whereby the servicer shall not send the Notice of Intent to Foreclose until the 121st day (See §1024.41(f))

Stay on Commencement § 1024.41(f)(2)

Further, where a borrower submits a complete application prior to the servicer sending the Notice of Intent to Foreclose, the servicer shall send said Notice:

- (1) The servicer has sent the borrower a notice that the borrower is not eligible for any loss mitigation, AND
- (2) The appeal process is not applicable, OR
- (3) The borrower failed to appeal within the applicable time period, OR
- (4) The borrower’s appeal has been denied, OR
- (5) The borrower rejects all loss mitigation options offered by the servicer, OR
- (6) The borrower fails to perform under an agreement on a loss mitigation option.

Stay on Judgments and Sale § 1024.41(g)

Where a borrower submits a complete application subsequent to the servicer’s sending the Notice of Intent to Foreclose, but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment, or conduct a foreclosure sale unless:

- (1) The servicer has sent the borrower a notice stating that the borrower is not eligible for any loss mitigation and the appeal process is not applicable, the borrower failed to appeal within the applicable time period or the borrower’s appeal has been denied OR
- (2) The borrower rejects all loss mitigation options offered by the servicer OR
- (3) The borrower fails to perform under an agreement on a loss mitigation option.

Prompt Review of Documents - §1024(b)(2)

Receipt 45 Days Prior to Sale

In this section, the rules create guidelines for servicers to follow upon receipt of both complete and incomplete loss mitigation application. More specifically, pursuant to §1024.41(b)(2) “if a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall” promptly review the documents upon receipt for completeness and notify the borrower in writing within 5 days of receipt acknowledging receipt and advising either of its completeness, or stating what documents are required for the application to be considered complete. Further, compliance requires the servicer to notify the homeowner that they should contact servicers of “any other mortgage loans secured by the same property to discuss available loss mitigation options.” (See §1024.41 (b)(2)(1)(B))

Required Servicer Steps Following Receipt of a Complete Packet- §1024(c)(i-ii)

37 Days Prior to Sale

According to §1024.41(c), if a servicer receives a ***complete*** loss mitigation package more than 37 days before the foreclosure sale, then (within 30 days), the servicer shall: Evaluate the borrower for all loss mitigation; and Shall provide the borrower with a notice detailing which loss mitigation options it will offer (if any).

Required Servicer Steps Following Receipt of an Incomplete Packet

Should the servicer receive an ***incomplete*** loss mitigation application more than 45 days before the foreclosure sale, then (within 5 days), the servicer shall send the borrower a notice stating what documents are required to complete the review and advise the borrower that if the documents are not submitted prior to the earliest of the following remaining dates, that the documents will go stale:

- (1) The date by which any document or information submitted by the borrower will be considered stale;
- (2) 120th day the borrower will be in default;
- (3) 90 days from the foreclosure sale; OR
- (4) 38 days before the foreclosure sale.

A review of the ***incomplete*** loss mitigation application does not satisfy the requirement to evaluate a ***complete*** loss mitigation application. These changes explicitly warn servicers from attempting to evade the review requirement by making an argument to the contrary. (See §1024.41(c)(2)(i))

The changes touch upon how a servicer should proceed where said servicer has exercised reasonable diligence in obtaining documents, but a loss mitigation application remains **incomplete** for a significant period of time. While the term “significant period of time” is not explicitly defined, the changes state that where said amount of time has passed, the servicer may evaluate an incomplete loss mitigation application and offer the borrower a loss mitigation option (or deny accordingly).

Appeal Process

The rules create a rigid appellate process whereby the homeowner has a right to challenge loan modification denials where a complete application was received at least 90 days prior to a foreclosure sale. In addition, all appeals created by these rules impose stays on the foreclosure process and require increased communication between servicers and their counsel to ensure all stays are indeed self-imposed. (See §1024.41 (h)(1))

Where a servicer denies a borrower for all loan modification options, the servicer is to send notice stating (See §1024.41(d)):

- (1) The specific reason for the denial; and
- (2) That the borrower may appeal said denial; and
- (3) The deadline and requirements for said appeal.

Should the borrower submit an appeal, the appeal is to be reviewed by different personnel than whoever denied the prior application. (See §1024.41(h)(3)). Within 30 days of an appeal, the servicer shall provide a notice to the borrower stating the servicer’s determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal. Should the appeal result in a loss mitigation offer, the servicer may require the borrower accept or reject an offer no earlier than 14 days after the servicer provides said offer. (See §1024.41(h)(4)).

A servicer’s determination under this preliminary appeal is not subject to further appeal. (Id.)

Time to Accept an Offer

This section imposes restrictions upon deadlines which a servicer may place upon a borrower to accept a loss mitigation offer. Presumably, these restrictions are in place to limit the ability of a servicer to increase the likelihood of borrower non-acceptance by providing minimal time to review loss mitigation offers.

Where a *complete* loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer. (See §1024.41(e)(1)). Where the expiration of said offer is clearly stated in the paperwork conveying the offer, a servicer may deem a borrower that has not accepted an offer within the deadline established to have rejected the offer of a loss mitigation option. (See §1024.41(e)(2)(i)).

Where a *complete* loss mitigation application is received less than 90 days, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer. (See §1024.41(e)(1)). Where the expiration of said offer is clearly stated in the paperwork conveying the offer, a servicer may deem a borrower that has not accepted an offer within the deadline established to have rejected the offer of a loss mitigation option. (See §1024.41(e)(2)(i)).

Submission of Payment but Non-Fulfillment of Requirements

This section covers situations where the servicer requires more than payment to finalize a loan modification offer. In these situations, the rules impose a guideline whereby a borrower who fails to satisfy the servicer's requirements for accepting a trial modification plan, but submits payments within the deadline, shall be provided a reasonable period of time to fulfill any remaining requirements. (See §1024.41(e)(2)(ii)).

§ 1024.39 Early Intervention Requirements for Certain Borrowers

Compliance with these changes requires the servicer to contact the delinquent borrower twice, once by "live contact" (*See* 1024.39(a)) and secondly via written notice (*See* §1024.39(b)). Pursuant to §1024.39(a), the servicer "shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency. Once establishing live contact, the servicer is to inform the borrower regarding the availability of loss mitigation options "if appropriate."

Pursuant to 1024.39(b) written notice is to be provided that encourages the borrower to contact the servicer, includes the telephone number for the servicer to contact the servicer and servicer's mailing address, provides a brief description of available loss mitigation options, advises the borrower how to obtain more information regarding loss mitigation options from the borrower, and "the website to access

either the Bureau list of the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations” (See §1024.39(b)(2)(i-v). Said notice is to be sent no later than the 45th day of the borrower’s default and only needs to be provided once in any 180-day period.

§ 1024.40 Continuity of Contact

Compliance with these changes requires a servicer to assign an employee as a delinquent borrower’s point of contact within 45 days of the borrower’s default. Said employee must be available to respond to the borrower’s inquiries and assist the borrower with loss mitigation options. Where a borrower contacts the employee and the employee fails to immediately respond, the servicer must ensure that a live response is provided within a timely manner. This requirement is not satisfied until the borrower has made “two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement.” (See §1024.40(a)(1-3)

The employee must be able to provide information to the borrower explaining what actions are required to apply for a loan modification, what actions a borrower must take to appeal a servicer denial for loss mitigation options, the status of any loss mitigation applications, the circumstances under which the servicer may commence a foreclosure action and applicable loss mitigation deadlines. (See §1024.40(b)(1)(i-v).

Further, the employee must be capable of retrieving, within a timely manner, a complete record of the borrower’s payment history, all written information the borrower has provided to the servicer, and if applicable, to prior servicers in connection with the loss mitigation application. (See §1024.40(b)(2).

Other Relevant Sections Not Discussed Herein

§1024.33 Mortgage Servicing Transfers

§1024.36 Requests for Information

§1024.37 Forced Place Insurance